

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

INDECK KEYSTONE ENERGY, LLC, a  
Delaware limited liability company,

Plaintiff

v.

VICTORY ENERGY OPERATIONS, LLC, a  
Delaware limited liability company,

Defendant.

CIVIL ACTION

No. 04-CV-325E

Judge Sean J. McLaughlin

**APPENDIX OF EXHIBITS TO VICTORY ENERGY'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

- A. Affidavit of Mark J. White, dated January 10, 2006.
- B. Plaintiff's Complaint, dated November 8, 2004.
- C. White Deposition Transcript, dated October 14, 2005.
- D. Kang Deposition Transcript, dated December 13, 2005.
- E. Brewer Deposition Transcript, dated October 13, 2005.
- F. License Agreement between Erie Power Technologies, Inc. and Victory Energy Operations, LLC, dated January 7, 2003. *(Sealed per order 3-29-06)*
- G. EPTI/CMI Asset Purchase Agreement, dated August 3, 2004.
- H. Victory Energy's Second Amended Counterclaim, dated November 11, 2005.
- I. Gdaniec Deposition Transcript, dated November 8, 2005.
- J. Petcos Deposition Transcript, dated November 9-10, 2005.
- K. Bernatowicz Deposition Transcript, dated November 8, 2005.

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**AFFIDAVIT OF MARK J. WHITE**

I, Mark J. White, being duly sworn on oath, depose and state:

1. I am the General Manager at Victory Energy Operations, LLC ("VEO"), and from 2002 until August 2003, I was the Director of Sales and Marketing at Erie Power Technologies, Inc ("EPTI").

2. I have personal knowledge of the matters contained in this affidavit.

3. Direct-fired, watertube boilers have been sold to generate steam for heating and other purposes for over 50 years.

4. Prior to approximately 1980, the predominate design of watertube boilers involved furnace and convective walls made up of tubes placed side by side in a row, known as a tangent tube design.

5. These boilers also included a significant amount of insulating material, called refractory, that was needed to keep the outside of the boiler from getting too hot.

6. By 1980, a new design for watertube boiler walls consisting of furnace and outer wall tubes spaced 3 to 4 or more inches apart, connected by steel bars welded to each tube, known as finned or welded walls had been developed.

**EXHIBIT**

A

7. Welded walls improved the boilers' heat retention, and created a seal that prevented flue gas emissions from leaking out of the combustion chamber and boiler, thereby decreasing emissions of noxious gases.
8. The industry developed water cooled front and rear walls, further improving the emissions and reducing the amount of refractory needed in the boiler.
9. The utilization of welded walls and water cooled front and rear walls is known in the industry as "full membrane" or "100% membrane."
10. By 1984, full membrane design became the standard in the boiler industry for watertube package boilers.
11. Prior to the execution of the license agreement, VEO purchased two (2) Keystone® boilers from EPTI for the Heinz plant in Muscatine, Iowa.
12. The Heinz boilers each had a steam capacity of up to 75,000 pph, and each had 100% membrane wall design.
13. EPTI designed and built the Heinz boilers for VEO.
14. Following the purchase of the Heinz boilers, VEO began discussions with EPTI regarding the possibility of licensing the technology and trademarks to manufacture and sell Keystone® O-style boilers.
15. After the Agreement was signed, EPTI provided, among other things, the following materials to VEO:
  - drawings of the various Keystone® boilers, depicting boilers with 100% membrane wall construction;
  - a draft sales manual, showing welded walls and water cooled front and rear walls as an optional feature to the Keystone® M Series boiler;
  - a power point presentation, showing welded walls and water cooled front and rear walls as an optional feature to the Keystone® M Series boiler;

- the Keystone Design Guide, describing features of the Keystone® M Series boilers with welded walls;
- the KPSC computer program, used by EPTI and VEO to rate boilers, that allowed VEO to rate boilers that incorporated 100% membrane technology.

16. During the time that IKE was the Licensor, VEO only manufactured, sold or installed items under the Agreement that were natural circulation, industrial watertube package boilers between, but not exceeding, 150,000 lbs. of steam per hour, as delineated in the Agreement.

17. During the time that IKE was the Licensor, VEO only manufactured, sold, or installed items under the Agreement that were natural circulation, industrial watertube package boilers with steam temperatures up to and including, but not exceeding, 750° Fahrenheit, as delineated in the Agreement.

18. During the time that IKE was the Licensor, VEO only manufactured, sold, or installed items under the Agreement that were natural circulation, industrial watertube package boilers with design pressures up to and including, but not exceeding, 1,200 lbs. of steam per square inch.

19. VEO did not utilize any Technical Information in conjunction with the design, manufacture or sale of any item other than those specifically permitted under the Agreement.


20. Every boiler VEO sold, including the boilers designed and rated by EPTI's engineers, utilized 100% membrane technology, the very technology IKE now claims VEO was not authorized to use in designing or selling the Keystone® boilers.

22. VEO requested and obtained assistance from EPTI's engineers in designing and rating the first several boilers sold under the Agreement.

24. VEO has made no modifications to the Products that in any way compromised the reliability or performance of the Products.

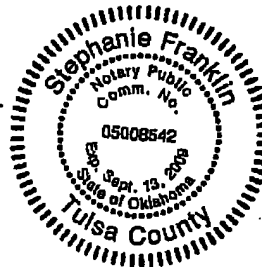
25. IKE has accepted and cashed each and every check that VEO tendered to IKE as a royalty payment under the Agreement.

Further affiant sayeth not. I affirm, under the penalties for perjury, that the foregoing representations are true.

  
\_\_\_\_\_  
Mark J. White

SUBSCRIBED AND SWORN TO  
before me this 20<sup>th</sup> day of January, 2006.

  
\_\_\_\_\_  
Notary Public



**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

INDECK KEYSTONE  
ENERGY, LLC, a Delaware limited liability  
company,

Plaintiff,

v.

VICTORY ENERGY  
OPERATIONS, LLC, a Delaware limited  
liability company,

Defendant.

CIVIL ACTION

NO. 04-cv-325 (ERIE)

**JURY TRIAL DEMANDED**

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**COMPLAINT**

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Plaintiff, Indeck Keystone Energy, LLC ("IKE"), by and through its undersigned counsel,  
hereby files the following Complaint against Defendant, Victory Energy Operations, LLC  
("VEO"):

**Nature of Action**

1. This is an action against VEO for trademark infringement, misappropriation of  
trade secrets, unfair competition and unjust enrichment, all of which have caused irreparable  
harm and substantial damages to IKE, and which will continue to cause irreparable harm and  
substantial damages to IKE, unless and until enjoined by this Honorable Court.

**EXHIBIT**

**B**

**Parties**

2. IKE is a Delaware limited liability company with an office and principal place of business located at 5300 Knowledge Parkway, Suite 200, Erie, Pennsylvania 16510-4660.

3. Upon information and belief, VEO is a Delaware limited liability company with an office and place of business located at 302 East 5<sup>th</sup> Avenue, Owasso, Oklahoma 74055. VEO also maintains in the Commonwealth of Pennsylvania certain resident agents and representatives, whose offices are located at 741 First Avenue, King of Prussia, Pennsylvania 19406, and 4024 Mt. Royal Boulevard, Allison Park, Pennsylvania 15101.

**Jurisdiction and Venue**

4. This Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338, as well as 15 U.S.C. § 1121, because this action involves federal questions under the Lanham Act, 15 U.S.C. §§ 1114, *et seq.*

5. This Court has supplemental jurisdiction over all additional claims set forth herein pursuant to 28 U.S.C. § 1367.

6. Upon information and belief, VEO resides in the Commonwealth of Pennsylvania and in this judicial district. Furthermore, VEO regularly solicits and transacts business in the Commonwealth of Pennsylvania and in this judicial district. Finally, the claims and causes of action set forth herein arise out of acts and/or omissions that were undertaken by VEO in this judicial district and/or directly affect property and entities in this judicial district. Accordingly, this Court has personal jurisdiction over VEO.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c), and 1400(a).

**Facts**

8. The Keystone Energy Division of Erie Power Technologies, Inc. ("EPTI") was in the business of designing, developing, testing, building, marketing, and installing water tube and fire tube boilers and related equipment for use in the electricity and power generation industries, as well as industries and entities involved in the co-generation of electricity.

9. EPTI marketed the aforementioned boilers and related equipment under the trade name and trademark "Keystone®". The Keystone® trademark is registered with the United States Patent and Trademark Office at No. 554,723, and has been in use by EPTI (and its predecessors) since at least February 12, 1952.

10. In particular, EPTI designed, developed, tested, built, marketed and installed certain specific lines of boilers and related equipment, including aftermarket parts and service, with the following qualities and characteristics (collectively, the "New-Style Boilers"):

- (a) Welded or membrane front, rear and side furnace walls;
- (b) Welded or membrane outer boiler convective walls;
- (c) "O", "D" and "A" style package boilers with rated capacity limits of up to at least 500,000 lbs. of steam per hour, steam temperatures of up to at least 1,000° Fahrenheit, and design pressures of up to at least 1,000 lbs. of steam per square inch;
- (d) Waste Heat Steam Generators with a rated capacity of up to at least 600,000 lbs. of steam per hour; and
- (e) Solid-fuel (coal and lignite, wood and bark, bagasse, municipal solid waste, refuse derived fuel, tires and agricultural waste) Water Tube Steam



Generators with a rated capacity of up to at least 600,000 lbs. of steam per hour.

11. EPTI also designed, developed, tested, built, marketed and installed the so-called "M" series standard package boiler line and related equipment, including aftermarket parts and service, that included the following qualities and characteristics (collectively, the "Old-Style Boilers"):

- (a) Rated capacity limits of between 29,000 and 150,000 lbs. of steam per hour;
- (b) Steam temperatures up to and including 750° Fahrenheit; and
- (c) Design pressures up to and including 1,200 lbs. of steam per square inch.

The New-Style Boilers and the Old-Style Boilers hereinafter are referred to collectively as the "Keystone® Boilers".

12. In connection with its aforementioned business activities, EPTI developed certain information and data relating to product design, manufacturing processes, product performance, and installation processes for the Keystone® Boilers (the "Keystone® Trade Secrets"). The Keystone® Trade Secrets are confidential, privileged, proprietary, not available to the public, and constitute recognizable trade secrets, which confer substantial benefits and competitive advantages upon the owner thereof.

13. EPTI also developed its own computer software to aid and otherwise facilitate the marketing, design, alteration, modification, customization, modeling, fabrication, installation, testing, and operation of its products, including the Keystone® Boilers (the "Keystone® Software"). The Keystone® Trade Secrets are an integrated part of the Keystone® Software, are

contained within the source code for the Keystone® Software, and otherwise are accessible to any person in possession of or with access to the Keystone® Software.

14. The Keystone® Software, *inter alia*, also contains a compilation of certain mathematic operations and formulae, which are essential for the use, interpretation, application, and manipulation of the Keystone® Trade Secrets contained therein. The Keystone® Software has been in use by EPTI for several years, and its accuracy and operation have been verified, all at great expense and effort by EPTI.

15. The Keystone® Software is confidential, privileged, proprietary, not available to the public, and constitutes a recognizable trade secret, which confers substantial benefits and competitive advantages upon the owner thereof.

16. On or about September 8, 2004, IKE acquired all of the intellectual property at issue in this action (including, but not limited to the Keystone® Trade Secrets, the Keystone® Software, and the exclusive ownership and right to use the Keystone® trademark) from CMI EPTI LLC. CMI EPTI LLC previously had acquired all of the assets of the then bankrupt EPTI through an auction that was supervised by the United States Bankruptcy Court for the Western District of Pennsylvania and approved by the Honorable Warren W. Bentz on or about August 27, 2004.

17. At all times relevant hereto, EPTI and IKE took all reasonable measures and precautions necessary for the protection of the Keystone® Trade Secrets, the Keystone® Software and the Keystone® trademark, and for the prevention of dissemination and use of the same by the public.

18. On or about January 7, 2003, EPTI and VEO entered into a License Agreement, pursuant to which EPTI granted to VEO a limited right to market, sell and manufacture the Old-

Style Boilers (as described in the License Agreement and attachments thereto), as well as the limited rights to use the Keystone® trademark and the Keystone® Software solely for the marketing, sale and manufacture of the Old-Style Boilers.

19. None of the misconduct set forth in this Complaint involves or pertains to VEO's marketing, sale and/or manufacture of the Old-Style Boilers or its use of the Keystone® trademark or Keystone® Software in connection with the marketing, sale and/or manufacture of the Old-Style Boilers. The Old-Style Boilers are a distinct line of boilers that are different from the New-Style Boilers, and this action is based upon acts and conduct by VEO that are wholly outside of, and unrelated to any rights that VEO may have, under the foregoing License Agreement.

20. VEO is a competitor of IKE with respect to IKE's manufacture, marketing, sale and service of New-Style Boilers. Upon information and belief, VEO has misappropriated the Keystone® Trade Secrets and the Keystone® Software, and, without the consent of IKE, improperly has been and continues to use the same to design, market, manufacture, and install boilers and related equipment that competes with, or otherwise is substantially the same as and/or similar to, the New-Style Boilers.

21. Upon information and belief, VEO also has misappropriated the Keystone® trademark and, without the consent of IKE, improperly has been and continues to use the same to confuse and mislead consumers as to the true identity of the designer and/or manufacturer of various boilers and related equipment and accessories that are being marketed, fabricated, and sold by VEO.

22. Furthermore, upon information and belief, VEO, without the consent of IKE, has been using and continues to use photographs, graphical images and depictions of New-Style

Boilers and related equipment (the "Keystone® Images") in VEO's sales and marketing materials, in such a way that improperly suggests to consumers that such products and related equipment are owned, designed, and/or manufactured by VEO, and/or that VEO otherwise was involved in certain jobs and construction projects utilizing New-Style Boilers when, in fact, it was not.

23. Neither EPTI nor IKE has permitted or consented to VEO's use of the Keystone® Trade Secrets, the Keystone® Software, the Keystone® trademark or the Keystone® Images in the manner set forth in this Complaint, and VEO's use of the same is not otherwise justified or privileged.

24. As a result of the misconduct by VEO, which is described more fully throughout this Complaint, IKE has suffered irreparable harm and substantial damages, including, but not limited to lost profits and revenue on the design, manufacture and sale of New-Style Boilers, loss of competitive advantage and market share, and loss of consumer good-will and reputation.

#### **COUNT I** **Trademark Infringement**

25. IKE incorporates by reference and realleges the preceding paragraphs of this Complaint, as though the same were set forth fully herein.

26. VEO has, without IKE's (or EPTI's) permission or consent, used the Keystone® name and trademark in interstate commerce to market, sell, distribute, and/or advertise for sale certain boilers and related equipment that competes with, or otherwise is substantially the same and/or similar to the New-Style Boilers.

27. The aforementioned use by VEO of the Keystone® name and trademark has caused and is likely to continue to cause confusion, mistake and the deception of consumers as to

the affiliation, connection and/or association of VEO with IKE with respect to the New-Style Boilers and as to the origin, sponsorship, or approval of VEO's goods, services and/or commercial activities by IKE.

28. VEO's unauthorized and unprivileged acts directly infringe upon IKE's rights in the Keystone® trademark in violation of the Lanham Act, 15 U.S.C. § 1114.

29. VEO intentionally engaged in the aforementioned misconduct, with full knowledge that EPTI, and now IKE, owns and has the exclusive right to use the Keystone® name and trademark with respect to New-Style Boilers.

30. As a direct and proximate result of the foregoing misconduct by VEO, IKE has suffered, and continues to suffer, substantial damages – the full amount and extent of which is not yet determinable, including irreparable harm for which there is no adequate remedy at law.

**COUNT II**  
**Trademark Dilution**

31. IKE incorporates by reference and realleges the preceding paragraphs of this Complaint, as though the same were set forth fully herein.

32. The Keystone® name and trademark is distinctive and has become famous.

33. VEO has, without IKE's (or EPTI's) consent, used the Keystone® name and trademark in interstate commerce to market, sell, distribute, and/or advertise certain boilers and related equipment that competes with, or otherwise is substantially the same as and/or similar to, the New-Style Boilers.

34. VEO's improper and unauthorized use of the Keystone® name and trademark has diluted and will continue to dilute the Keystone® trademark, in violation of the Lanham Act, 15 U.S.C. § 1125.

35. VEO intentionally engaged in the aforementioned misconduct, with full knowledge that EPTI, and now IKE, owns and has the exclusive right to use the name and trademark Keystone® with respect to New-Style Boilers, and with the willful intention of trading on the reputation of the Keystone® name and New-Style Boiler product line(s), thereby causing dilution of the Keystone® trademark.

36. As a direct and proximate result of the foregoing misconduct by VEO, IKE has suffered, and continues to suffer, substantial damages – the full amount and extent of which is not yet determinable, including irreparable harm for which there is no adequate remedy at law.

**COUNT III**  
**Trademark Dilution (54 Pa.C.S.A. § 1124)**

37. IKE incorporates by reference and realleges the preceding paragraphs of this Complaint, as though the same were set forth fully herein.

38. VEO's improper and unauthorized use of the Keystone® name and trademark have diluted and will continue to dilute the Keystone® trademark, in violation of the Pennsylvania Trademark Act, 54 Pa.C.S.A. § 1124.

39. VEO willfully intended to trade on the reputation of the Keystone® name and trademark and the New-Style Boiler product line(s), thereby causing dilution of the Keystone® trademark.

40. As a direct and proximate result of the foregoing misconduct by VEO, IKE has suffered, and continues to suffer, substantial damages – the full amount and extent of which is not yet determinable, including irreparable harm for which there is no adequate remedy at law.

**COUNT IV**  
**Pennsylvania Uniform Trade Secrets Act (12 Pa.C.S.A. § 5301, et seq.)**

41. IKE incorporates by reference and realleges the preceding paragraphs of this Complaint, as though the same were set forth fully herein.

42. As set forth above, the Keystone® Trade Secrets and the Keystone® Software were developed at great expense and effort by EPTI, and the ownership rights and interests in the same were transferred to IKE.

43. The Keystone® Trade Secrets and the Keystone® Software enable IKE to compete effectively and profitably in the relevant commercial market, and confer upon IKE distinct and substantial commercial advantages. Accordingly, the Keystone® Trade Secrets and the Keystone® Software are of great economic value to IKE's competitors in the commercial market for New-Style Boilers (and boilers with the same or similar capacities and capabilities), including VEO.

44. The Keystone® Trade Secrets and the Keystone® Software are not known by or available to the public, and are not otherwise discoverable by public means. IKE (and EPTI) has taken all reasonable measures and precautions necessary for the protection of the Keystone® Trade Secrets, the Keystone® Software and the Keystone® trademark, and for the prevention of dissemination and use of the same by the public.

45. At all times relevant hereto, VEO knew that the Keystone® Trade Secrets and the Keystone® Software were, in fact, trade secrets and proprietary information. Upon information and belief, VEO knowingly acquired the Keystone® Trade Secrets and the Keystone® Software: (i) by improper means; and/or (ii) under circumstances that gave rise to a duty to maintain their secrecy and to limit their use; and/or (iii) from or through a person or persons who owed a duty to IKE (and EPTI) to maintain their secrecy and to limit their use.

46. Upon information and belief, VEO improperly has used and continues to use the Keystone® Trade Secrets and the Keystone® Software to design, market, manufacture, and install boilers and related equipment that competes with, or otherwise is substantially the same as and/or similar to, the New-Style Boilers.

47. As a direct and proximate result of the foregoing intentional and malicious misconduct by VEO, IKE has suffered, and continues to suffer, substantial damages – the full amount and extent of which is not yet determinable, including irreparable harm for which there is no adequate remedy at law.

**COUNT V**  
**Unfair Competition**

48. IKE incorporates by reference and realleges the preceding paragraphs of this Complaint, as though the same were set forth fully herein.

49. VEO's misuse and misappropriation of the Keystone® Trade Secrets, the Keystone® Software, the Keystone® trademark, and the Keystone® Images, as described more fully above, constitute unfair competition.

50. As a direct and proximate result of the foregoing misconduct by VEO, IKE has suffered, and continues to suffer, substantial damages – the full amount and extent of which is not yet determinable, including irreparable harm for which there is no adequate remedy at law.

**COUNT VI**  
**Unjust Enrichment**

51. IKE incorporates by reference and realleges the preceding paragraphs of this Complaint, as though the same were set forth fully herein.

52. Through its misappropriation and unauthorized use of the Keystone® Trade Secrets, the Keystone® Software, the Keystone® trademark, and the Keystone® Images, VEO has



reaped substantial benefits, including, but not limited to revenue and profits, increased and/or improved market position, increased production efficiency, and other competitive advantages.

53. At the same time, and as a direct and proximate result of these circumstances, IKE has suffered corresponding injury and harm, including, but not limited to lost revenue and profits, loss of competitive advantage and market share, and loss of consumer good-will and reputation.

54. VEO would be unjustly enriched, if it were permitted to retain all of the aforementioned benefits and advantages without compensating IKE for its corresponding loss. Accordingly, VEO is liable to IKE for unjust enrichment.

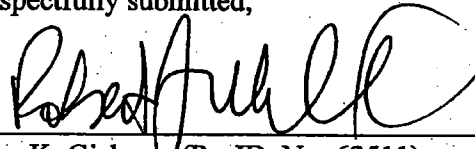
WHEREFORE, as to all Counts of this Complaint, Plaintiff Indeck Keystone Energy, LLC respectfully demands judgment in its favor and against Defendant Victory Energy Operations, LLC:

- (a) Preliminarily and permanently enjoining VEO from further acts of trade secret misappropriation and misuse, unfair competition and violations of the Lanham Act, the Pennsylvania Trademark Act, the Pennsylvania Uniform Trade Secrets Act, and the common law, including, without limitation, ordering VEO:
  - (i) to cease all use of the Keystone® Trade Secrets, the Keystone® Software, the Keystone® trademark and the Keystone® Images with respect to the New-Style Boilers, including any and all derivatives thereof and improvements thereon;
  - (ii) to return all information and materials constituting, referring and/or relating to the Keystone® Trade Secrets, the Keystone® Software, the Keystone® trademark and the Keystone® Images in its custody and control, and any and all derivatives thereof and improvements thereon, to IKE;
  - (iii) to otherwise cease any and all deceptive practices and acts of unfair competition;
- (b) Ordering an accounting of all sales and profits which VEO has realized or will hereafter realize as a result of using the Keystone® Trade Secrets, the Keystone® Software, the Keystone® trademark and the Keystone® Images to market, sell, distribute, and/or advertise certain boilers and related equipment that competes

with, or otherwise is substantially the same as and/or similar to, the New-Style Boilers;

- (c) Awarding IKE its actual damages in an amount to be proven at trial, including, but not limited to actual damages and lost sales suffered by IKE as a result of VEO's misconduct, as well as any profits of VEO that are attributable to the above-described misconduct and not otherwise taken into account in computing the aforementioned actual damages, plus interest;
- (d) Awarding IKE any additional amounts the VEO received as an unjust enrichment for its unlawful acts;
- (e) Awarding IKE punitive and/or exemplary damages for VEO's intentional, willful and wanton misconduct;
- (f) Awarding IKE its attorneys' fees, expenses and costs of suit incurred in this action; and
- (g) Awarding IKE such other and further relief as the Court deems just, equitable and appropriate under the facts and circumstances of this matter.

Respectfully submitted,



John K. Gisleson (Pa. ID. No. 62511)  
Keith E. Whitson (Pa. ID. No. 69656)  
Robert J. Williams (Pa. ID. No. 76139)  
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Attorneys for Plaintiff,  
Indeck Keystone Energy, LLC

Dated: November 8, 2004

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1 IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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INDECK KEYSTONE ENERGY, )

4 LLC, a Delaware limited )

liability company, )

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Plaintiff, ) CIVIL ACTION

6

vs. ) No. 04-CV-325E

7

VICTORY ENERGY OPERATIONS, ) Judge Sean J. McLaughlin

8 LLC, a Delaware limited )

liability company, )

9

Defendant. )

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13 The videotape deposition of MARK WHITE taken on

14 behalf of the Plaintiff before Pamela B. Stinchcomb,

15 Certified Shorthand Reporter in and for the State of

16 Oklahoma, on the 14th day of October, 2005, in the

17 City of Tulsa, State of Oklahoma, pursuant to the

18 stipulations of the parties.

19

20

21

PAMELA B. STINCHCOMB, CSR #1544

22

DAVIDSON REPORTING SERVICE

5508 South Lewis Avenue

23

Tulsa, Oklahoma 74105

(918) 745-9959

24

25



White, Mark (10/14/2005)

Page 1

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1 A. It would have been most likely from  
2 probably the last four years I was with the company,  
3 approximately. I don't know the exact date that I  
4 became responsible for that particular group.

5 Q. During that four-year period,  
6 approximately, what were the sales of Keystone  
7 boilers?

8 A. In the four-year -- I don't know. I don't  
9 recall.

10 Q. Can you approximate in any way?

11 A. Keystone watertube boilers?

12 Q. Yes.

13 A. It was very small. In our peak, we  
14 probably sold somewhere between seven and ten million  
15 dollars worth of Keystone watertube boilers, which I  
16 don't --

17 Q. Annually?

18 A. Yes, sir. That would have been the peak.  
19 The low end would probably be closer to three or four  
20 million or none at all.

21 Q. What was the range of sizes in terms of  
22 steam flow for the Keystone boilers that were being  
23 sold during that time?

24 A. Our primary focus was in the larger units.  
25 When I say larger, 175,000 and up. Occasionally we

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1 would run across an application where we might sell a  
2 couple of smaller units. We generally found that we  
3 weren't really competitive in that market.

4 Q. Why not?

5 A. Well, you have to understand the Zurn  
6 Energy Division wasn't set up to compete with low  
7 overhead, small companies that were providing small  
8 watertube package boilers for industrial steam  
9 markets. It's difficult to compete when you have  
10 much larger and higher overheads and you have a  
11 sophisticated engineering system to compete with  
12 somebody who's much more simplified.

13 Q. Did you develop an understanding as to the  
14 Keystone watertube technology?

15 A. Generally. I wouldn't call myself an  
16 expert.

17 Q. What did you do to educate yourself as to  
18 the Keystone technology?

19 MR. SHEEAN: Objection, vague.

20 MR. GISLESON: What -- how is that  
21 vague?

22 MR. SHEEAN: The term "Keystone  
23 watertube technology" I think is a vague term.

24 Q. (By Mr. Gisleson) What did you do to  
25 educate yourself about the Keystone watertube

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1 A. It might go into a steam turbine to produce  
2 steam. It's drier steam, higher temperature, more  
3 energy involved, you know. So -- and it's used in  
4 different aspects. It can be used through steam  
5 turbines to generate power, so forth.

6 Q. So what happened next with VEO in terms of  
7 the potential license agreement?

8 A. Well, John met independently with Chairman  
9 Kim with DKME Machinery, John Viskup. I'm sorry, met  
10 with Chairman Kim of DKME Machinery, DKME, and  
11 Stephen Kang, as well. And they discussed the  
12 potential of a license agreement. I wasn't involved  
13 really in those discussions.

14 Q. Were you present?

15 A. I was in the booth.

16 Q. So the meeting between Viskup, Kim and Kang  
17 occurred in the booth --

18 A. Yes, sir.

19 Q. -- at Power Gen?

20 A. Yes, sir.

21 Q. How long was that meeting, approximately?

22 A. Maybe an hour, if that.

23 Q. What was discussed that you heard?

24 A. They just assessed the license agreement,  
25 the benefits, you know, potential revenue that could

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1 be generated as part of the license. Beyond that, I  
2 don't know the specifics.

3 Q. Was there any discussion as to the specific  
4 design parameters for the boiler that was to the  
5 licensed?

6 A. I don't know. I wasn't that involved in  
7 that discussion.

8 Q. Are you aware of any notes that anyone  
9 maintained at that meeting?

10 A. No.

11 Q. Did you have any notes?

12 A. No.

13 Q. Was there any memorandum prepared  
14 summarizing the meeting?

15 A. No.

16 Q. Did you, after that meeting, have any  
17 conversations with Chairman Kim or Stephen Kang  
18 concerning the discussion with John Viskup?

19 A. Yes.

20 Q. When did that occur?

21 A. It occurred in the booth, and it also  
22 occurred when we were arrived back, when Stephen Kang  
23 and myself arrived back in Erie.

24 Q. Starting with the discussion in the booth,  
25 what were you told?

00243

1 Q. Did you expect VEO to provide samples of  
2 its marketing materials to you for approval?

3 A. Not necessarily. I mean, if it fell within  
4 the boundaries of what was provided, I didn't have  
5 that concern if -- the agreement, again, was -- the  
6 spirit of the agreement was not to be so limiting  
7 that it became so onerous that nothing could get done  
8 because you were so tied up in providing information  
9 back and forth on a daily and hourly basis.

10 (Plaintiff's Exhibit Number 39 was marked  
11 for identification.)

12 Q. (By Mr. Gisleson) I show you what's been  
13 marked as White Exhibit 39. It's a document stamped  
14 VEO830 to VEO890. Is this an e-mail with enclosures  
15 that you sent to Shawn Brewer and John Viskup on  
16 March 17, 2003?

17 A. Yes.

18 Q. You write: "Shawn and John, as per our  
19 discussion of March 6, 2003, I have forwarded by  
20 express mail a draft copy of the Keystone "M" series  
21 Sale Manual for your review. The manual requires  
22 completion of the introduction section, contact  
23 information, et cetera. The manual includes all of  
24 the following information." Where was the discussion  
25 held on March 6, 2003?



00055

1 mischaracterizes the evidence. You can answer.

2 A. I was not aware of that, no.

3 Q. (By Mr. Gisleson) When was the first time

4 you had a discussion with someone from VEO about the

5 use of membrane wall technology and the Keystone

6 boilers that were licensed?

7 A. Oh, Shawn Brewer and I -- it was discussed

8 through the license agreement.

9 Q. Pardon me?

10 A. It was discussed through the license

11 agreement as being part of the technology that would

12 be provided.

13 Q. When was the first time you had that

14 discussion?

15 A. I don't recall.

16 Q. It was after the license agreement was

17 executed?

18 A. No, it was before the license. It's during

19 the period of which the license agreement was being

20 negotiated.

21 Q. You had that conversation with Shawn

22 Brewer?

23 A. With Shawn, yes.

24 Q. By phone?

25 A. Yes, I believe it was by phone.

00244

1 A. I don't recall.

2 Q. Do you know whether it was by phone or in  
3 person?

4 A. No, I don't.

5 Q. Did VEO ask you to prepare a sales manual  
6 for the "M" series?

7 A. They -- we had discussed it. They had  
8 mentioned that they'd known that other -- I believe  
9 other competitors in the industry had a -- had a nice  
10 sales manual. They were interested in having  
11 something similar and would ask -- and asked if I  
12 would be -- would assist in helping them generate  
13 one. And I -- as I had mentioned prior, it was  
14 always better for me to provide the information than  
15 to have them trying to create it themselves. So the  
16 information that's in here was definitely provided by  
17 me.

18 Q. What was the source of the information that  
19 you provided here?

20 A. Information that was at my disposal within  
21 Erie.

22 Q. Did you simply copy the sales manual that  
23 EPTI had for Keystone?

24 A. No, there was no such sales manual that  
25 EPTI had. I had to create -- I had to structure the

00245

1 information and create this document.

2 Q. On Page VEO832 under background license,  
3 you wrote: "Victory Energy Operations is the  
4 exclusive licensee of Erie Power Technologies, Inc.,  
5 formally Aalborg, for the sale, execution,  
6 fabrication and delivery of Keystone watertube  
7 package boilers with steam capacities of 29,000 pph  
8 up to and including 150,000 pph." Why didn't you  
9 refer to design in that sentence?

10 A. Well, execution and design, in my opinion,  
11 are synonymous.

12 Q. Has VEO sold any watertube boilers outside  
13 of the United States, Mexico and Canada?

14 A. Keystone watertube boilers, no.

15 Q. From where did you obtain the drawings for  
16 the "M" series standard models?

17 A. Within Erie Power.

18 Q. Did you show this proposed sales manual to  
19 anyone at EPTI before sending it to VEO?

20 A. I don't recall.

21 Q. If you look at Page VEO841, do you see how  
22 this is a drawing of a furnace wall construction for  
23 welded tube and membrane?

24 A. Yes.

25 Q. And that there's a date apparently on here

00250

1 A. No, no.

2 Q. What does that refer to?

3 A. Just a select list to assist Victory Energy  
4 to have at least a reference list to present to their  
5 clients or prospective clients to show that there are  
6 -- there is experience. There is experience within  
7 given range of application so they wouldn't have such  
8 a difficult time in trying to convince a customer  
9 even though as Victory -- as Victory Energy, they  
10 didn't have any experience. It was supporting the  
11 agreement, supporting the spirit of the agreement,  
12 trying to get the revenues moving.

13 Q. Did you have any discussions with Shawn  
14 Brewer or anyone else at VEO as to whether this list  
15 of selected references should be modified to  
16 eliminate those boilers that were outside the scope  
17 of the license agreement?

18 A. No, I don't recall.

19 Q. Did you advise specifically Shawn Brewer  
20 that VEO could use this list as is without  
21 eliminating those boilers that are larger than  
22 150,000 pph?

23 A. Yeah. When I provided the agreement, it  
24 was to be utilized for sales and marketing.

25 Q. Without alteration?

00251

1 A. Correct.

2 MR. GISLESON: Let's take a break.

3 (Break was taken)

4 Q. (By Mr. Gisleson) In connection with  
5 preparing a license agreement, what was your  
6 understanding as how the transfer of technical  
7 information back from VEO to EPTI was to occur at  
8 conclusion of the license.

9 A. At the conclusion of the license  
10 agreement? I guess in a general sense, and I have to  
11 be honest, I -- without reading -- rereading the  
12 agreement, I would have to get an exact definition of  
13 what the requirements are. I would have to review  
14 the agreement. But in a general sense, all of the  
15 information that was transferred at the initial stage  
16 and throughout the agreement from EPTI or, in this  
17 case, IKE would have to be returned, any proprietary  
18 information, the mark and so on and so forth. And  
19 then at the time frame, there would be no -- VEO  
20 could not continue to use the mark, couldn't use the  
21 sales literature and so on and so forth. So at that  
22 point, it basically would be terminated.

23 Q. VEO also couldn't use any of the technical  
24 information to design or manufacture "O" type  
25 boilers?

00001

1 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF PENNSYLVANIA  
2  
3  
4 INDECK KEYSTONE ENERGY LLC, )  
5 Plaintiff, )  
6 VS )Civil Action No. 04-325 Erie  
7 VICTORY ENERGY OPERATIONS, )Judge Sean J. McLaughlin  
LLC, )  
8 Defendant )JURY TRIAL DEMANDED

9

10

11

12 ORAL AND VIDEOTAPED DEPOSITION OF

13 STEPHEN YOUNG KANG

14 December 13, 2005

15 Volume 1 of 1

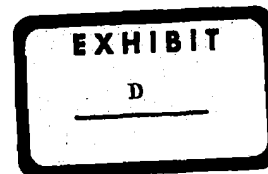
16

17 Oral Deposition of STEPHEN YOUNG KANG, produced as a  
witness at the instance of MR. CHRISTOPHER T. SHEEAN,  
18 ATTORNEY FOR DEFENDENT VICTORY ENERGY OPERATIONS, LLC,  
and duly sworn, was taken in the above-styled and  
19 numbered cause on December 13, 2005, from 1:50 p.m.  
to 5:03 p.m., before Lydia P. Battle, CSR, RPR, in and  
20 for the State of Texas, reported by stenographic means,  
at the offices of Jones & Young, P.C., 2700 Post Oak  
21 Blvd., Suite 1350, Houston, Harris County, Texas,  
pursuant to the Federal Rules of Civil Procedure and the  
22 provisions stated on the record attached hereto.

23

24

25



Kang, Stephen 12/13/05

Page 1

00018

1 A And -- and Mark said that -- that he felt like  
2 it would be in good interest of the company to sell  
3 certain boiler lines or technology to that -- not sell --  
4 I'm sorry. License the certain boiler line to Victory  
5 Energy which Erie Power would not sell; hence, we will  
6 get royalties from a product line that we may never sell.

7 Q Was Mr. Kim at the Power-Gen Conference?

8 A Yes. He was at the Orlando Power-Gen Conference  
9 as well.

10 Q Did Mr. Kim have any conversations with anyone  
11 at Victory Energy during that conference?

12 A Not regarding the license agreement. Mr. Kim  
13 did meet Victory Energy and its CEO John Viskup.

14 Q But they did not discuss the license agreement,  
15 to the best of your knowledge?

16 A No. No. To the best of my knowledge, there was  
17 no discussion of the license agreement.

18 Q Okay. So, what did you say back to Mr. White  
19 when he described to you this license agreement  
20 opportunity?

21 A I told Mark White, since you're in charge of  
22 sales and marketing, if you feel like that that would  
23 help Erie Power to have additional revenue that we would  
24 otherwise not, then that he should look into it.

25 Q And what did -- and what happened next?

00019

1 A I was introduced to Victory's CEO John Viskup  
2 and he and I had typical chitchat of cordial hellos  
3 and -- and John Viskup did mention to me that Victory was  
4 interested in licensing certain boiler lines from Erie  
5 Power.

6 Q Did he tell you what type of boiler lines he was  
7 interested in licensing?

8 A He -- he did, but then I wasn't very aware of  
9 the boiler technology or the company at the time, so that  
10 I had asked John Viskup if he would contact our engineers,  
11 Erie Power's engineers, and discuss those technical  
12 specifications.

13 Q To the best of your knowledge or recollection,  
14 as you sit here today, what types of boiler lines did  
15 Mr. Viskup indicate he was interested in licensing?

16 A It sounded to me like what Victory was  
17 interested in was certain size of boiler lines for  
18 certain types.

19 Q Can you recall anything else about the types of  
20 boilers that Victory was interested in licensing at that  
21 meeting that you had at the Power-Gen Conference in  
22 December 2002?

23 A The main number that -- that John Viskup, or  
24 Victory, told me that I recall is 150 pound per pressure  
25 was a term they used a lot.



00020

1 Q Okay. What happened next in terms of pursuing a  
2 license agreement, to the best of your knowledge?

3 A Victory and Erie Power then started having  
4 communication regarding potentially setting up a license  
5 agreement. I had delegated that task, or project, to  
6 Mark White. I put him in charge of drafting or -- or  
7 reviewing the license agreement.

8 Q Let me go back for a minute. Were you ever  
9 aware of -- strike that. Had Victory Energy ever  
10 purchased any boilers from Erie Power, to the best of  
11 your knowledge, prior to the entry of the license  
12 agreement?

13 A I had been told that Victory wanted or -- or did  
14 work on a project previously one time with Erie, but  
15 that's -- that's basically what I recall at that --  
16 before we had entered into license agreement.

17 Q Did you know any of the specifics about the  
18 types of boilers that Victory had purchased?

19 A No.

20 Q Excuse me. Was there any -- strike that. Did  
21 either Mr. Viskup or Mr. White mention Keystone as the  
22 type of boiler that would be licensed at that Power-Gen  
23 Conference?

24 A Yeah, basically Keystone boiler is the boiler  
25 line for Erie Power. That is the name for the boiler

00021

1 line.

2 Q And you authorized Mr. White to draft and  
3 negotiate the license agreement on behalf of Erie Power?

4 A Yes.

5 Q Did you review any drafts of the license  
6 agreement?

7 A Yes.

8 Q Did you have any changes to the license agreement  
9 that you can recall?

10 A No.

11 Q Do you know who signed the license agreement on  
12 behalf of Erie Power?

13 A I believe it was originally signed by Mark White  
14 on behalf of Erie Power.

15 Q Did you authorize Mr. White to sign that license  
16 agreement on behalf of Erie Power?

17 A Yes.

18 Q What was Erie Power's financial situation at the  
19 end of 2002 when you came onboard?

20 A Erie Power had been in financial difficulty for  
21 almost a year at that time, so it was financially already  
22 in a fairly bad shape at -- at the end of 2002.

23 Q Did you have an understanding as to whether or  
24 not the license agreement with Victory Energy would  
25 provide a positive revenue stream to Erie Power that it

00060

1 that Victory Energy is in breach of the agreement, does he?

2 MR. GISLESON: Objection. Mischaracterizing  
3 the document.

4 MR. SHEEAN: I'm asking what Mr. Kang's  
5 understanding of the document is.

6 Q (BY MR. SHEEAN) You can answer, sir.

7 A No, he did not have a conclusion on that issue.

8 Q Did you ever reach a conclusion as to whether or  
9 not Victory Energy was in breach of the agreement?

10 A No.

11 Q What is your understanding of the "M" series  
12 boiler?

13 A My understanding of the "M" series is more of  
14 a -- it was designed before the "O" series, so, therefore,  
15 the term "outdated" or "antiquated" were used by our  
16 people.

17 Q Do you have an understanding of why Victory  
18 Energy would want to license outdated and antiquated  
19 technology?

20 A I believe Victory wanted to sell those lines  
21 because they had a niche market that was different from  
22 Erie Power perhaps to certain industries that fit those  
23 certain types of boilers that we would not sell or have  
24 an access to in the market.

25 Q How did you develop that understanding?

00072

1 the Asset Purchase Agreement between CMI America

2 Incorporated and Erie Power Technologies Incorporated,

3 dated as of August 3, 2004. Do you see that?

4 A Yes.

5 Q Were you involved in the negotiation of this --

6 of this contract?

7 A Yes.

8 Q Were you involved in any of the due diligence

9 relative to the representations and warranties set forth

10 in this agreement?

11 A Yes.

12 Q And if you'll turn to page 39, which is not the

13 last page, it's about four pages, five pages from the

14 back. Is that your signature on that page, "Stephen Kang

15 President of Erie Power Technologies Incorporated"?

16 A Yes.

17 Q You signed this agreement on behalf of Erie Power,

18 correct?

19 A That's correct.

20 Q Turn back to page 11 of the agreement.

21 A Okay.

22 Q Section 2.10, "Intangible Property;" do you see

23 that?

24 A Yes.

25 Q Under subsection (e), it says, "No license or

00073

1 royalty agreement to which Seller is a party is in breach  
2 or default by any party thereto or the subject of any  
3 notice of termination given or, to the Seller's Knowledge,  
4 threatened;" do you see that?

5 A Yes.

6 Q And you acknowledged that to be the case when  
7 you signed this agreement, correct?

8 A Yes.

9 Q And subset (c) says, "To the --" "To Seller's  
10 Knowledge, no third party is infringing or has  
11 misappropriated any of --" "-- any of the Intellectual  
12 Property Rights." Do you see that?

13 A Yes.

14 Q And, again, you acknowledged that to be the case  
15 when you signed this agreement, correct?

16 A Yes. That's correct.

17 Q Have you ever heard the term "Old style boilers"  
18 used in the boiler industry?

19 A No.

20 Q Are you aware of any instance where Victory  
21 Energy utilized Erie Power's trademarks without its  
22 authorization?

23 A No, I'm not aware.

24 Q Are you aware any instance where Victory Energy  
25 utilized the trademarks now owned by Indeck Keystone

00001

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2

3

INDECK KEYSTONE ENERGY, )

4 LLC, a Delaware limited )

liability company, )

5 )

Plaintiff, ) CIVIL ACTION

6 )

vs. ) No. 04-CV-325E

7 )

VICTORY ENERGY OPERATIONS, ) Judge Sean J. McLaughlin

8 LLC, a Delaware limited )

liability company, )

9 )

Defendant. )

10

11

12

13 The videotape deposition of SHAWN BREWER taken

14 on behalf of the Plaintiff before Pamela B.

15 Stinchcomb, Certified Shorthand Reporter in and for

16 the State of Oklahoma, on the 13th day of October,

17 2005, in the City of Tulsa, State of Oklahoma,

18 pursuant to the stipulations of the parties.

19

20

21

22

PAMELA B. STINCHCOMB, CSR #1544

23

DAVIDSON REPORTING SERVICE

5508 South Lewis Avenue

24

Tulsa, Oklahoma 74105

(918) 745-9959

25



Brewer, Shawn (10/13/2005)

Page 1

00178

1 wall in addition to refractory wall?

2 A. I don't remember making a specific e-mail

3 to that effect because it was assumed that it was an

4 option.

5 Q. Assumed by whom?

6 A. Well, not assumed. It was stated as an

7 option in all of the literature and all of the

8 manuals that we received. It said optional membrane

9 walls, as well. Because it -- like we stated before,

10 in the '50s when this was developed, they were all

11 tangent tubes. But as time went on and progressed in

12 the '90s and now, there is no market for tangent tube

13 boilers.

14 Q. You thought that membrane wall construction

15 in the Keystone "M" series boiler was an option

16 because of the sales and marketing materials you

17 received from Mark White?

18 MR. SHEEAN: Objection,

19 mischaracterizes the prior testimony. You can

20 answer.

21 A. Well, I knew they were options because of

22 that.

23 Q. (By Mr. Gisleson) Were you aware that the

24 marketing materials that Mr. White sent you covered

25 the full range of Keystone boilers that would include